

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2016/HP/2448

(Civil Jurisdiction)

BETWEEN

**MOHAMMED HANIF PATEL
AYSHA HANIF PATEL**



**1st PLAINTIFF
2nd PLAINTIFF**

AND

**ZESCO LIMITED
CAPITAL FISHERIES LIMITED**

**1ST DEFENDANT
2ND DEFENDANT**

***Before the Hon Lady Justice Betty Mwaka Majula this 18th Day
of March 2020.***

For the Plaintiffs : Mr. R. Ngulube of Tembo Ngulube & Associates.
For the 1st Defendant : Ms. J. Kunda - Legal Officer, ZESCO.
For the 2nd Defendant : Mr. G.S. Cornhill of Wilson & Cornhill.

J U D G M E N T

Cases referred to:

1. *Dunlop vs Selfridge (1915) AC 847*
2. *Khalid Mohamed vs The Attorney General (1982) ZR 49*
3. *Wilson Masauso vs Avondale Housing (1982) Z. R. 172*

Authority Referred to:

H. G. Beale (Ed) *Chitty on Contracts*, Volume 1, General Principles, 31st Edition (London; Thomson Reuters Limited, 2012)

Introduction

The plaintiffs commenced this action against the defendant claiming the following reliefs:

- (i) *A declaration that the 2nd defendant's action to disconnect electricity power supply to the plaintiffs is illegal and hence null and void.*
- (ii) *A declaration that the 1st defendant's actions to fail, refuse and/or neglect to reconnect electricity power supply to the plaintiffs is in breach of the express/implied conditions of the electricity power supply agreement, requiring that power can only be disconnected for a justifiable cause or reason.*
- (iii) *General damages for breach of the said express/implied conditions of the electricity power supply agreement.*
- (iv) *Special damages for loss of rent for November, and December, 2016 in the aggregate sum of U\$D 35,700 and loss of future earnings in rentals.*
- (v) *Aggravated damages.*
- (vi) *Damages for mental distress and humiliation.*
- (vii) *Interest and costs.*

Summary of Pleadings

According to the Statement of Claim, it was averred that the 2nd and 3rd plaintiffs are Directors in the 1st plaintiff company (Omars Investment later misjoined by an order of the court) which is involved in various business interests. The 2nd defendant is a company incorporated in Zambia which owns a property adjacent to that of the plaintiffs located at plot number 9066, Katanga road, Chinika, Lusaka.

In 2012 the Omars Investment applied for electricity power supply to the 1st defendant for its premises. The application was subsequently approved and allotted account number 3812302. The 1st defendant thereafter connected power to the plaintiffs' property through a dedicated transformer installed at the 2nd defendant's premises.

The plaintiffs' property has six (6) warehouses which were rented out to a company called Zdenakie Limited at a total cost of US\$1,250. On 20th November 2016, electricity power supply to the plaintiffs' premises was disconnected without any notice or justifiable cause by the 2nd defendant by removing a cable that was running from the transformer. The plaintiffs subsequently lodged a complaint to the 1st defendant about the disconnection but were advised that they should deal with the 2nd defendant as there is no disconnection order in their system.

The plaintiffs therefore contend that the refusal, failure or neglect to reconnect power to the plaintiffs' property is in breach of the express and implied obligations under the power supply agreement with the plaintiff. It has been further stated that as a consequent of the power disconnection, the tenant terminated the lease agreement with the plaintiffs effective 6th December, 2016 and refused to pay rent for November, and December 2016. The plaintiffs therefore claims special damages for loss of rent totaling to US\$35,700 as well as loss of future earnings to be assessed.

The 1st defendant filed into court its defence on 10th January 2017 in which it averred that in the year 2011 the 1st plaintiff applied for a temporal builder's supply of electricity for a property known as plot number 9066, Katanga, Light Industrial area which was meant for construction purposes only. He thereafter made another application for permanent supply of electricity. However, both applications were not processed by the 1st defendant as the customer was not ready and there was no structure at the site.

Around the same period, the 2nd defendant (Capital Fisheries Limited) applied for power supply and a dedicated 500 KVA transformer was installed on their premises. A temporal builders' supply connection of power supply was later connected from the 2nd defendant's transformer.

It was further stated that the 1st defendant only learnt of the disconnection after the plaintiff complained. It then carried out

investigations which revealed that the cable running from the 2nd defendant's upgraded 800 KVA transformer was removed.

It therefore denied any liability as the disconnection was not generated by the 1st defendant.

The 2nd defendant filed its defence on 27th June 2017 where it stated that it procured and installed a 500 KVA dedicated transformer for power supply at its premises at a cost of K245,168,200.50 (unrebased). The plaintiffs thereafter requested to tap power from its transformer using a cable. Permission was granted on condition that it pays the sum of the K122, 548.10 which was 50% of cost of the transformer. The plaintiff did not pay this amount and was later notified that it would be disconnected on 15th December 2015, as the transformer could no longer accommodate extra loads.

The 2nd defendant later procured an 800 KVA transformer at a cost of K397, 332.48 to cater for its increased power demand. With this upgrade, it was no longer obliged to continue allowing the plaintiffs to tap power and was consequently not liable for termination of the lease agreements with its tenants.

In light of the foregoing the 2nd defendant contends that it has suffered loss as a result of the failure by the plaintiffs to pay K122,584,102.30 as well as execute a draft agreement on the supply of power from 2011 to 15th December, 2015.

It therefore counterclaimed:

- i) *Damages for use of its transformer.*
- ii) *Interest and costs.*

In its reply the plaintiffs averred that it refused to sign the draft contract because by then, the transformer was the absolute property of the defendant. They further state that the 2nd defendant does not possess authority to disconnect electricity supply to customars.

Summary of plaintiff's evidence

In his testimony, Mohammed Hanif Patel who testified as PW1 essentially repeated the contents of his statement of claim. He narrated that he applied to ZESCO for electricity power supply for his premises on plot 9066, Katanga road, Chinika area of Lusaka. In the meantime, his tenants (Omars Investment Limited) made an arrangement to tap power from Capital Fisheries Sub-Station or transformer, which was allowed in 2011. A meter box, and a cable running from the transformer to the premises were then installed.

It was his evidence that in July 2014, he executed a lease agreement with Zdenakie to be tenants at a consideration of US\$8,400 and US\$9,450 respectively.

In November, 2016 power supply was abruptly disconnected which resulted in the tenants not renewing the lease agreements in respect of the property.

The matter was reported to ZESCO Limited at their faults department along Kafue Road. He stated that he continued paying

ZESCO for the bills that were coming. He is now claiming for the reliefs as endorsed on the writ of summons.

When cross-examined by Ms. Kunda, PW1 testified that an application was made for power supply by his tenants to ZESCO which was approved. He admitted that power was supplied to Omars 'the tenant' and the transformer was located in the premises of Capital Fisheries. When referred to documents on page 1, 6 and 7 of the agreed bundle of documents, he conceded that the defendant applied and paid for a substation.

He denied being a Director in Omars Investments Limited although the statement of claim indicated so. He also confirmed that at page 2 of the defendant's bundle of documents is a letter from Capital Fisheries to the Director at Omars Investment concerning disconnection of power. He conceded that ZESCO did not issue a disconnection notice and the account is still active.

When further cross-examined by Mr. Cornhill, he told the Court that the amended statement of claim is correct in all aspects and that the relationship between the plaintiffs and Omars Investment is that of tenancy. He then changed his mind and said the statement of claim is not correct.

When referred to paragraph 8 of the statement of claim he admitted that he the owner of the property. He said the statement of claim is further not correct in that respect as he owns the plot jointly

with his wife. He further stated that he did not pay anything towards the purchase of the transformer located in the Capital Fisheries yard.

He conceded that there was no power supply agreement between himself and the 1st defendant. Further he testified that the proposed agreement was between the 1st defendant and Omars Investment.

He further stated that ZESCO was not a party to the lease agreement between the 2nd plaintiff with Zdenakie but that Omars Investment arranged for power supply.

In re-examination he confirmed that he is not a shareholder in Omars Investment. He also stated that ZESCO made it clear to them that payment does not confer ownership on equipment.

Evidence from the defendants

In its defence the defendant's first called Kelly Mwansa Chisanga, the Manager for Corporate Customer Services at ZESCO Limited. He narrated that he manages commercial activities which include connections and complaint resolutions. In this case Mohammed Hanif made an application for power supply as shown by a document on page 8 of the agreed bundle. However, this application could not be processed as there was no structure on the premises at the time.

Another application was later made for a temporal builder's supply to tap power from a transformer that was located at the 2nd

defendant's property. The 1st plaintiff was then advised that in the area his property was located, he needed to buy a transformer. His response was that he was not ready to purchase one at the time.

He went on to state that ZESCO sells the capacity and not the transformer. Once a transformer is bought and installed, it becomes the property of ZESCO. The supply to the 2nd defendant was dedicated meaning that the 1st defendant cannot connect another customer. However, the plaintiffs engaged the 2nd defendant for a temporal builder's supply connection which was subsequently processed by ZESCO.

Later, the 2nd defendant applied to ZESCO for a transformer upgrade from 500KVA to 800KVA for its increased demand. The transformer was eventually upgraded at the cost of K397, 332.48. At the time of changing the transformer, the cable going to the plaintiffs' premises was left out of the circuit. It was his testimony that ZESCO received a complaint concerning the said disconnected. A team of investigators was sent to establish the cause of the disconnection. It was discovered that the cable supplying power to the plaintiffs' premises had been left out of the circuit.

It was at this point that they advised the plaintiffs to apply for its own transformer, which it never did. He denied the assertion that ZESCO was responsible for the disconnected power supply. He further testified that ZESCO only disconnects power if a client owes them money or has requested them to do so. That ZESCO still issues fixed service charges for as long as the account is still active.

When cross-examined, he reiterated that when a transformer is installed at the expense of an applicant, it becomes ZESCO property. On further questioning, he testified that the parties to the agreement on page 4 – 5 of the defendant's bundle of documents are Omars Investment and the 2nd defendant. He explained that even if a customer allows another person to tap power, it still remains a dedicated supply because of the initial cost.

That in this case, the 2nd defendant allowed the plaintiffs to tap power from their transformer. That in *casu*, ZESCO removed the cable as part of the upgrade. There was no disconnection because there were no monies owed but it was at upgrade where cables were removed.

The second witness for the defence was Elisha Zulu, the Human Resources Manager for the 2nd defendant. He recounted that the 2nd defendant is located at Stand 9065 Lusaka and it deals in fresh fish, and meat products.

He recalled applying for electricity connection from the 1st defendant who advised them to purchase and install a transformer at their premises. He referred the court to a document on page 6 of the defendant's bundle and explained that the 2nd defendant spent about K245,000.00 to purchase and install the substation. The understanding at the time of purchase between the 1st and 2nd defendant was that power supply was a dedicated service for use by the 2nd defendant only. The 2nd defendant later entered into an arrangement with Omars Investment Limited to allow the latter tap

power from their dedicated transformer. In return, Omars was to pay the 2nd defendant 50% of the cost of the transformer.

Power supply was thereafter connected from the transformer although Omars never paid for the power. The 2nd defendant prepared an agreement for Omars to sign and implement but there was no response. Subsequently, the 2nd defendant's usage of power increased due to installation of more cold rooms. The increased demand for power compelled the 2nd defendant to upgrade their transformer from 500 Kva to 800 Kva. The 2nd defendant delivered a notice to Omars to the effect that it would disconnect power supply.

It was his evidence that the termination was done by the 1st defendant during the upgrade process.

In cross-examination, this witness maintained that the 2nd defendant had an agreement with Omars to share power on condition that Omars would pay 50% of the cost. The agreement was never signed by Omars although power supply was connected for a period of over four years.

This was the evidence that I received from the witnesses. Thereafter, Counsel for the parties filed skeleton arguments on behalf of their respective clients.

Summary of parties' arguments

The gist of the submissions on behalf of the plaintiff was that the evidence on record had established that electricity power supply was disconnected to the plaintiffs' property by the 2nd defendant acting on its own or in concert with the 1st defendant. Mr. Ngulube submitted that the only issue to be determined was whether such action was illegal to warrant the imposition of damages.

For the definition of illegality Mr. Ngulube referred to the learned authors of Black's Law Dictionary, Eighth edition at page 763 where it states that:

"1. An act that is not authorized by law.

2. The state of not being legally authorized."

It was contended that the action by the 2nd defendant to disconnect electricity to the plaintiffs' property by unilaterally and permanently removing the cable that supplied power was illegal. According to Mr. Ngulube, it is only the 1st defendant who is authorized to connect or disconnect power. He further argued that the 2nd defendant company entered into a contract with Omars Investment Limited, albeit not being signed. Acting on the unsigned contract, the 2nd defendant allowed Omars Investment Limited to connect to the 1st defendant grid through its acquired transformer.

He contended that the only remedy available to the 2nd defendant was to sue Omars Investment Limited for damages and not to resort to self-help action of unilaterally and permanently disconnecting power to the plaintiffs' property.

In concluding his argument, Mr. Ngulube submitted that where there has been an unlawful conduct of disconnection of power supply or failure to reconnect, damages should follow. He accordingly beseeched the court to find in favour of the plaintiff and award him damages.

On behalf of the 1st defendant, detailed written submissions were filed. The thrust of the 1st defendant's argument is that the plaintiff had failed to prove his claims. Ms. Kunda pointed out that the plaintiff applied for electricity supply and was informed that he had to pay for a transformer as a prerequisite to be connected. He was then placed on a temporal builders' supply, connection from the 2nd defendant's dedicated transformer.

Ms. Kunda argued that the plaintiffs had not come to Court with clean hands and were therefore not entitled to the reliefs claimed. She contended that there was therefore no breach of an informal agreement on the part of the 1st defendant to warrant damages to the plaintiff.

On behalf of the 2nd defendant, Mr. Cornhill submitted that the pleadings and the evidence established that there were three contracts that existed namely:

- a) Contract of power supply between the defendants.
- b) Contract between the 2nd defendant and Omars for conveyance of power from the substation on the 2nd defendant's property to Omars.

c) Contract of power supply between Omars and the 1st defendant.

With regard to the contract between Omars and the defendants, Mr. Cornhill submitted that the plaintiff was not privy to this contract and cannot therefore claim any rights under this contract. He sought refuge for this proposition from the case of ***Dunlop vs Selfridge***¹ where it was held that only parties to a contract can sue on it.

He further pointed out that there was no contract between the plaintiffs and the 1st defendant.

Mr. Cornhill went on to argue that damages are connected to either breach of contract or the statute. It was his position that the plaintiff has not provided proof that the defendants breached any contract or statute. His claims should therefore fail.

Findings of fact and decision of the Court

I have considered that the evidence and submissions of Counsel. From the evidence adduced so far, I find the following facts to have been established: the 1st defendant and the 2nd defendant entered into an agreement for power supply. After paying K245,168.204, the 1st defendant installed a dedicated 500 Kva transformer at the 2nd defendant's premises on Stand No. 9065, Lusaka.

Omars Investment Limited subsequently entered into an agreement with the 2nd defendant to tap power from the latter's

dedicated transformer. As consideration for this agreement, Omars agreed to pay K122,584,102.30 which was 50% of the cost of the transformer. Omars Investments Limited was connected to the transformer although it never honoured its commitment to the said amount to the 2nd defendant. The sort of power supply that was connected through the dedicated transformer was for a temporal builder's supply.

As a result of increased power demand, the 2nd defendant applied to the 1st defendant to upgrade the 500 Kva to 800 Kva, which was later done at a cost of K355,830.00.

As earlier stated, the plaintiffs are claiming for a declaration that there was a breach of the express/implied conditions of an electricity power supply agreement with the 1st defendant. They are also claiming for a declaration that the disconnection of power supply by the 2nd defendant was illegal. In order to determine whether or not there was a breach of the power supply agreement, it is imperative to determine the existence of the contract and the terms and conditions thereof if any.

The evidence on record has established that there was a temporal builder's power supply agreement between Omars Investment Limited who were the plaintiffs' tenants on the one hand and ZESCO Limited on the other. The connection to the plaintiffs' premises was through a dedicated transformer that was in the 2nd defendant's premises. Further according to the evidence of DW1, to tap power from a dedicated transformer, there must be consent from

the respective customer who purchased the transformer. In this case, consent to tap power was granted on condition that Omars Investment will pay 50% of the purchase price of the transformer. The said 50% was never paid by Omars Investment.

The learned authors of ***Chitty on Contracts***, 31st edition at page 171, paragraph 2 – 001, discuss the requirements for the formation of a contract as follows:

“The first requirement for the formation of a contract is that the parties should have reached agreement. Generally speaking, agreement is reached when an offer made by one of the parties (the offeror) is accepted by the other (the offeree or acceptor). Such an agreement may, however, lack contractual force because it is incomplete, because its terms are not sufficiently certain, because its operation is subject to a condition which fails to occur...”

My examination of the contract between Omars Investment and the 2nd defendants to tap power from their dedicated transformer reveals that it was dependent on the fulfillment of condition that they pay 50% of the cost of the transformer. Having failed to make the requisite payment, the 2nd defendant, through their contract who was working on the upgrade, gave Omars notice to disconnect the cable supplying power to the plaintiffs’ premises. The view I take is that they were fortified in engaging their contractor to disconnect the cable as they did not want Omars Investment to continue to tap power from their dedicated transformer.

As earlier indicated, Omars Investment never complied with its obligation to pay the 50% of the cost of the transformer. The long and short of this state of affairs is that there was no consideration from the plaintiffs which is a prerequisite for formation of a legally binding and enforceable contract. On this premise, the 2nd defendant was therefore in order to withdraw its consent which resulted in the disruption of electricity supply to the plaintiffs from the dedicated transformer.

To compound the situation, the type of electricity supply agreement that was between the plaintiffs and the 1st defendant was a temporal builders' supply agreement. The evidence on record however, reveals that the plaintiffs were using the temporal supply for their commercial activities. This clearly shows that there was also a breach on the part of the plaintiffs.

Having scrutinized the totality of the evidence, I see no basis upon which I could fault the 2nd defendant's action to disconnect electricity power supply and make a declaratory order to the effect that their action was illegal and hence null and void.

Turning to the 1st defendant, for clarity sake I must hasten to state that the disconnection of the power supply was not at the instance of the 1st defendant. At the expense of being repetitive, the 1st plaintiff was notified of the requirements needed in order for the 1st defendant to supply power. The requirement being the purchase of a transformer which, as earlier stated, the plaintiffs failed to pay for.

They instead resorted to entering into some consensual arrangement with the 2nd defendant to tap power supply from the latter's dedicated transformer. The 1st defendant therefore cannot be held liable for what transpired between the 2nd defendant and the plaintiffs. The 1st defendant did not refuse or neglect to reconnect power to the plaintiffs' premises. I am quiet perplexed at the assertion by the plaintiffs that the 1st defendant was in breach of the express/implied conditions of electricity power supply agreement by their refusal to reconnect electricity power to the plaintiffs. The disconnection of power supply cannot be put at the door step of the 1st defendant. I therefore decline the invitation to make a declaratory order against the 1st defendant that they were in breach of the express/implied conditions of electricity power supply agreement for reasons advanced in the preceding paragraphs.

It follows therefore that the claim for general damages cannot be sustained as I have found that there was no breach of the express/implied power supply agreement. Equally the claim for special damages for rent for November, and December 2016 in the aggregate of US\$35,700 and loss of future earning has no legal legs to stand on in view of the finding that there was no breach of any contractual terms. Other reliefs claimed such as aggravated damages, interest and costs equally fall away.

The law is very clear as to where the onus of proof lies in civil cases. The holding of the Supreme Court in the case of ***Khalid***

Mohamed vs The Attorney General² restated in **Wilson Masauso Zulu vs Avondale Housing Project**³ was that:

"An unqualified proposition that a Plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so, the mere failure of the opponent's defence does not entitle him to Judgment. I would not accept a proposition that even if the Plaintiff's case has collapsed of its inanity or some reason or other, Judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need a defence."

In the present case the plaintiffs have failed to prove that they are entitled to the declarations sought as well as the attendant damages for breach of contract. They did not come to Court with clean hands. Their action accordingly fails and is dismissed.

Counterclaim

Pertaining to the counterclaim made by the 2nd defendant in the sum of K122,584,102.30 being 50% of the cost of the transformer, and accessories, due to the 2nd defendant from Omars Investment Limited, I am unable to grant this claim as Omars is no longer a party to these proceedings. The counterclaim is accordingly dismissed.

Conclusion

The plaintiffs have failed to discharge the onus placed on them to prove their claims which are dismissed forthwith. The counterclaim by the 2nd defendant has also been dismissed.

The plaintiffs are condemned in costs to be taxed in default of agreement.

Delivered at Lusaka this 18th day of March, 2020



Betty Mwaka Majula
HIGH COURT JUDGE